IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.478 OF 2005

Badamidevi Bhansali ... Petitioner

Vs.

Mukund V. Shah & Ors. ... Respondents

Mr. V.R. Tripathi for the petitioner.

Mr. D.C. Mullaji for respondents 1, 3, 4 and 5.

CORAM: SMT. RANJANA DESAI, J.

DATED: 3RD MAY, 2005.

P.C.:-

1. The petitioner is the original defendant in R.A.E. Suit No.393/575 of 2003. Interim Notice No.217 of 2004 was taken out by the defendant through Mr. Devichand, who claims to be her constituted attorney, for setting aside the order passed by the trial court on 21/10/2003 directing the suit to proceed ex-parte and also for allowing the defendant to file her written statement and contest the suit. The trial court by its order dated 23/4/2004 dismissed the notice. The defendant carried the matter in appeal. The lower appellate court dismissed the appeal. Hence, this writ petition.

2. I have heard the learned counsel for the parties. The learned counsel for the petitioner contended that the defendant is an illiterate woman. Her constituted

attorney is her husband. During the relevant period, he was out of station and also he was sick. Therefore, he could not attend to the matter. He submitted that in the suit premises, the defendant is carrying on business. It is the only place which is available to the defendant to carry on the business and if the defendant is not allowed to contest the suit, irreparable harm, loss and injury will be caused to him and, therefore, this court may set aside the order dated 21/10/2003 and allow the defendant to contest the suit. The learned counsel contended that if this court so feels, the defendant may be saddled with costs.

3. I have heard the learned counsel appearing for the respondents. He vehemently opposes setting aside of the order dated 21/10/2003. He contended that the petitioner has been totally negligent. He submitted that even the power of attorney was not produced in the trial court and, a copy which is handed over to him is not properly stamped.

4. There is some substance in the submissions of the learned counsel for the respondents. Final opinion as to whether the power of attorney is in accordance with law or not, will be given by the trial court after examining the matter in depth. However, in the peculiar facts and circumstances of the case and in the interest of justice and in the light of the judgment of this court in **Chintaman Sukhdeo Kaklij and others, v. Shivaji**

Bhausaheb Gadhe and others, 2004 (5) BCR 573, in my opinion, the order dated 21/10/2003 passed by the trial court needs to be set aside. However, the defendant should be saddled with heavy costs. The defendant's constituted attorney is present in the court. In my opinion, the defendant must pay cost quantified at Rs.10,000/- to the plaintiffs and payment of costs will be condition precedent for setting aside the order dated 21/10/2003. Hence, I pass the following order.

5. Order dated 23/4/2004 passed by the trial court and order dated 20/12/2004 passed by the lower appellate court are set aside. The order dated 21/10/2003 passed by the trial court directing the suit to proceed ex-parte and refusing the defendant to file her written statement and contest the suit is also set aside. The defendant shall file her written statement within a period of three weeks from today. The defendant shall pay costs quantified at Rs.10,000/- to the plaintiffs. Payment of costs should be condition precedent for setting aside the order dated 21/10/2003. The costs be paid to the plaintiffs within one week from today. Petition is disposed of in the aforestated terms.

(SMT. RANJANA DESAI, J.)